

DOCKET FILE COPY ORIGINAL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

May 24, 1996

IN REPLY REFER TO:

RECEIVED

MAY 24 1996

TELETYPE UNIT
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Richard C. Wiley
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

Dear Mr. Wiley:

For your information, enclosed are copies of recent correspondence between Members of Congress and the Commission relating to satellite digital audio radio service pioneer's preference applications.

Sincerely,



Richard M. Smith
Chief
Office of Engineering and Technology

Enclosures

cc: GEN Docket No. 90-357 and IB Docket No. 95-91
PP-24, PP-86, PP-87

No. of Copies rec'd 1
List ABCDE

FRANCIS J. KELLY, JR., VINCENNA, INDIANA

THE CHURCH, BELLEVILLE

May 15, 1996

Subsequently, in 1994, the Commission selected three applicants for broadband personal communications services (PCS) licenses to be granted "Pioneer Preference" awards. Aside from a generic concern of how the new policy of competitive bidding could be harmonized with the Commission's policy of "Pioneer Preference," Congress was specifically concerned that the

The Honorable Reed E. Hundt

May 15, 1996

Page 2

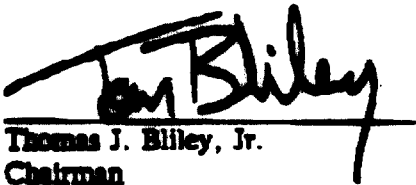
review process for the grant of these awards not be arbitrary or subjective. As a consequence, legislation was enacted in 1994 to ensure that any future "Pioneer Preference" awards would not suffer from these infirmities. Specifically, the law created a peer review process with a panel comprised of "experts in the radio sciences drawn from among persons who are not employees of the Commission" to ensure that the award is justified and does not result in unjust enrichment of the grantee.

The law also makes clear that the outside peer review requirement does not apply to applications that have been accepted for filing before September 1, 1994. It is our understanding that this exception applies in the instant case. Notwithstanding the precise legal requirements in the instant case, we would hope that you could appreciate, given the history of Congressional concern and action in this area, the great sensitivity that has over time attached to this program. In this regard, how does the Commission reconcile a "Pioneer Preference" award program with a license award system based on a free market? Do you believe it is appropriate to grant a "Pioneer Preference" award for DARS? If so, what process has the Commission employed in considering applications for such an award? Finally, how does this process compare with whatever process the Commission employed in granting PCS "Pioneer Preference" awards?

Thank you for your immediate attention to these concerns and responses to these questions. Let us add in closing that it is unequivocally not our intent to slow down the Commission's process in bringing DARS technology to the American public as soon as possible. Therefore, we would appreciate your response to this letter no later than May 22, 1996.

With kindest regards, we remain

Sincerely,


Thomas J. Bliley, Jr.
Chairman


John D. Dingell
Ranking Member



OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

May 22, 1996

The Honorable Thomas J. Bliley, Jr.
Chairman
Committee on Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Dear Mr. Chairman:

Thank you for your letter of May 15, 1996 expressing your concerns about the possibility of a pioneer's preference award in the satellite digital audio radio service (satellite DARS).

I agree that any such award should comport with both the letter and the spirit of the law. Inasmuch as your questions address adjudicatory pioneer's preference proceedings currently pending before the Commission, it would not be appropriate for me or the Commission staff to comment on the merits or outcome until the full Commission has made a final decision based on the record before it. I have asked Richard Smith, Chief of the Office of Engineering and Technology, the Office responsible for administering the Commission's pioneer's preference program, to respond to your inquiry without addressing the merits or the outcome of the proceedings. His letter is attached.

Again, thank you for conveying your views on this subject.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Reed E. Hundt", with a stylized, sweeping flourish at the end.

Reed E. Hundt
Chairman

ENCLOSURE



Federal Communications Commission
Washington, D.C. 20554

May 22, 1996

The Honorable Thomas J. Bliley, Jr.
Chairman
Committee on Commerce
U.S. House of Representatives
2125 Rayburn House Office Building
Washington, D.C. 20515-6115

Dear Mr. Chairman:

Thank you for your letter of May 15, 1996 to Chairman Hundt expressing your concerns about the possibility of a pioneer's preference award in the satellite digital audio radio service (satellite DARS). Chairman Hundt has asked me to respond to your questions. You ask four questions regarding the consistency of the pioneer's preference program with use of competitive bidding procedures, the appropriateness of a satellite DARS pioneer's preference award, the process followed by the Commission in considering applications for a satellite DARS pioneer's preference award, and how that process compares to that used to consider pioneer's preference requests for PCS. Each specific question is addressed below.

1. How does the Commission reconcile a "Pioneer Preference" award program with a license award system based on a free market [competitive bidding]?

The Commission has reconciled its pioneer's preference program with the use of competitive bidding by charging for such licenses and implementing other mechanisms to avoid "unjust enrichment." Thus, even in situations in which competitive bidding is employed to assign licenses, award of a pioneer's preference may be appropriate where a pioneer meets the established criteria for demonstrating that it has made significant contributions to the development of a new telecommunications service or technology.

The process by which we reconciled our pioneer's preference program with competitive bidding took place following the August 1993 enactment of legislation which first authorized the Commission to assign licenses via competitive bidding. The Commission promptly commenced a rulemaking proceeding to examine whether the pioneer's preference rules should be repealed to take into account this new, market-based, approach to assigning licenses. The Commission stated that the pioneer's preference program had been established at an earlier time, when the Commission was limited to awarding licenses by random selection and comparative hearings. The establishment of competitive bidding authority created a new dynamic for license assignments. Accordingly, the Commission proposed

The Honorable Thomas J. Bliley, Jr.
May 22, 1996
Page 2

several options to revise the pioneer's preference rules in light of its new competitive bidding authority. These options included discounting bids by designated pioneers by some specific amount or percentage without guaranteeing them a license or, alternatively, requiring payment for a guaranteed license awarded to a pioneer. Review of the Pioneer's Preference Rules, Notice of Proposed Rule Making, ET Docket No. 93-266, 8 FCC Rcd 7692 (1993).

Prior to final resolution of these issues, Congress in 1994 enacted the legislation discussed in your letter. Specifically, Congress directed the Commission to continue the pioneer's preference program until September 30, 1998 for pioneer's preference applications received after September 1, 1994. Uruguay Round Agreements Act, Pub.L. No. 103-465, Title VIII, § 801, 108 Stat. 4809, 5050 (1994), codified at 47 U.S.C. § 309(j)(13)(D)(GATT Legislation). It also required the Commission to charge a fee for pioneer's preference licenses issued on or after August 1, 1994, based on the winning bids for comparable licenses. 47 U.S.C. § 309(j)(13)(B), (G). While this was similar to the approach taken by the Commission when it earlier assessed payments for narrowband and broadband PCS pioneer's preference licenses, it provided the Commission explicit authority to do so. In implementing this legislation, the Commission interpreted the statute and the continued need to reconcile the pioneer's preference program and the use of auctions as follows:

[W]e believe that competitive bidding affects our pioneer's preference program. The GATT legislation directs us to maintain the program until September 30, 1998 for preference requests accepted for filing after September 1, 1994, and we believe that terminating the program for requests filed on or before that date -- even if desirable -- would accord inconsistent treatment to preference requests simply because of the date on which they were submitted for filing. We do not see a valid reason to distinguish preference requests on that basis. Accordingly, we are retaining the program not only for pioneer's preference requests accepted for filing after September 1, 1994, but also for those accepted for filing on or before that date.

* * *

We find persuasive the argument by several commenting parties that not requiring a pioneer's payment would be inequitable to other licensees and would result in a financial advantage to certain competitors in services in which licenses are assigned by competitive bidding. . . . [P]roviding free licenses to pioneers has the potential to distort the competitive bidding process and provide pioneers with a financial advantage over their competitors. Further, we believe that free licenses would contribute toward an uneconomic

allocation of the spectrum to the extent that recipients of free licenses do not value the spectrum as much as other bidders, especially where licenses are highly interdependent. Finally, we believe that free licenses could result in "unjust enrichment" to pioneers to the extent that their contributions justify only a discounted spectrum payment. As Congress recently recognized in the GATT legislation, payment by pioneers is "necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amounts paid for comparable licenses" and to "recover for the public a portion of the value of the public spectrum resource by requiring [each pioneer's preference recipient], as a condition for receipt of its license, to agree to pay [for its license]."

Review of the Pioneer's Preference Rules, Second Report and Order and Further Notice of Proposed Rule Making, ET Docket No. 93-266, 10 FCC Rcd 4523 (1995) (footnote omitted).

2. *Is it appropriate to grant a "Pioneer Preference" for DARS?*

Without addressing or prejudging the merits of the specific DARS pioneer's preference requests, which are still pending adjudicative matters before the Commission, a pioneer's preference award could be granted if any of the requests meet the stringent standards set forth in the Commission's rules and orders. These standards are described in response to question 3, below.

Section 7 of the Communications Act states that it is the policy of the United States to encourage the development of new technologies. The pioneer's preference rules were adopted in furtherance of this policy. Satellite DARS would appear to qualify for the pioneer's preference program, so long as one or more applicants have adequately demonstrated that it was responsible for the innovations that led to development of the service and that its proposal is technologically feasible and the rules ultimately adopted are an outgrowth of the pioneer's preference proposal. In addition, award of a pioneer's preference would recover a portion of the value of the public spectrum because, pursuant to Section 309(j)(13) of the Communications Act, a pioneer's preference grantee must pay a sum calculated by incorporating the price paid for comparable spectrum licensed via competitive bidding.

The Honorable Thomas J. Bliley, Jr.
May 22, 1996
Page 4

3. *What process has the Commission employed in considering applications for a pioneer's preference award.*

The responsibility for evaluating pioneer's preference applications rests with my office -- the Office of Engineering and Technology (OET). OET established a panel consisting of six individuals from three different Commission Bureaus and Offices to review each satellite DARS pioneer's preference application. The panel was chaired by an OET economist who helped write the pioneer's preference rules. The other members of the panel were all electronics engineers.

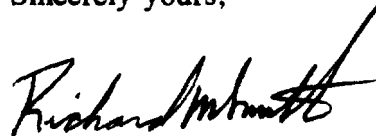
The panel evaluated each of the pioneer's preference requests based on the following criteria, in accordance with Section 1.402 of the Commission's Rules: 1) the applicant must have developed an innovative proposal that leads to the establishment of a service not currently provided or a substantial enhancement of an existing service; 2) the applicant must have demonstrated the technical feasibility of its proposal; and, 3) the rules adopted in a proceeding must be a reasonable outgrowth of the applicant's proposal. The findings of the panel were incorporated into a draft agenda item for Commission consideration, which is currently pending.

4. *How does this process compare with whatever process the Commission employed in granting PCS "Pioneer Preference" awards.*

The process employed in evaluating satellite DARS applications was more formal than the process used in evaluating both narrowband and broadband PCS pioneer's preference applications. With respect to PCS, no panels were established. The Commission mostly relied on the record developed by the pleadings and other filings submitted in support of and in opposition to the numerous PCS pioneers preference requests filed. It also relied on the submission of experimental license reports from the applicants and the examination of the record by various Commission personnel.

I trust that this reply is responsive to your concerns. If you have further questions, do not hesitate to contact me.

Sincerely yours,



Richard M. Smith
Chief, Office of Engineering and Technology



OFFICE OF
THE CHAIRMAN

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

May 22, 1996

The Honorable John D. Dingell
Ranking Minority Member
Committee on Commerce
U.S. House of Representatives
2322 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Dingell:

Thank you for your letter of May 15, 1996 expressing your concerns about the possibility of a pioneer's preference award in the satellite digital audio radio service (satellite DARS).

I agree that any such award should comport with both the letter and the spirit of the law. Inasmuch as your questions address adjudicatory pioneer's preference proceedings currently pending before the Commission, it would not be appropriate for me or the Commission staff to comment on the merits or outcome until the full Commission has made a final decision based on the record before it. I have asked Richard Smith, Chief of the Office of Engineering and Technology, the Office responsible for administering the Commission's pioneer's preference program, to respond to your inquiry without addressing the merits or the outcome of the proceedings. His letter is attached.

Again, thank you for conveying your views on this subject.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Reed E. Hundt", with a long, sweeping horizontal stroke at the end.

Reed E. Hundt
Chairman

ENCLOSURE



Federal Communications Commission
Washington, D.C. 20554

May 22, 1996

The Honorable John D. Dingell
Ranking Minority Member
Committee on Commerce
U.S. House of Representatives
2322 Rayburn House Office Building
Washington, D.C. 20515

Dear Congressman Dingell:

Thank you for your letter of May 15, 1996 to Chairman Hundt expressing your concerns about the possibility of a pioneer's preference award in the satellite digital audio radio service (satellite DARS). Chairman Hundt has asked me to respond to your questions. You ask four questions regarding the consistency of the pioneer's preference program with use of competitive bidding procedures, the appropriateness of a satellite DARS pioneer's preference award, the process followed by the Commission in considering applications for a satellite DARS pioneer's preference award, and how that process compares to that used to consider pioneer's preference requests for PCS. Each specific question is addressed below.

1. How does the Commission reconcile a "Pioneer Preference" award program with a license award system based on a free market [competitive bidding]?

The Commission has reconciled its pioneer's preference program with the use of competitive bidding by charging for such licenses and implementing other mechanisms to avoid "unjust enrichment." Thus, even in situations in which competitive bidding is employed to assign licenses, award of a pioneer's preference may be appropriate where a pioneer meets the established criteria for demonstrating that it has made significant contributions to the development of a new telecommunications service or technology.

The process by which we reconciled our pioneer's preference program with competitive bidding took place following the August 1993 enactment of legislation which first authorized the Commission to assign licenses via competitive bidding. The Commission promptly commenced a rulemaking proceeding to examine whether the pioneer's preference rules should be repealed to take into account this new, market-based, approach to assigning licenses. The Commission stated that the pioneer's preference program had been established at an earlier time, when the Commission was limited to awarding licenses by random selection and comparative hearings. The establishment of competitive bidding authority created a new dynamic for license assignments. Accordingly, the Commission proposed

The Honorable John D. Dingell
May 22, 1996
Page 2

several options to revise the pioneer's preference rules in light of its new competitive bidding authority. These options included discounting bids by designated pioneers by some specific amount or percentage without guaranteeing them a license or, alternatively, requiring payment for a guaranteed license awarded to a pioneer. Review of the Pioneer's Preference Rules, Notice of Proposed Rule Making, ET Docket No. 93-266, 8 FCC Rcd 7692 (1993).

Prior to final resolution of these issues, Congress in 1994 enacted the legislation discussed in your letter. Specifically, Congress directed the Commission to continue the pioneer's preference program until September 30, 1998 for pioneer's preference applications received after September 1, 1994. Uruguay Round Agreements Act, Pub.L. No. 103-465, Title VIII, § 801, 108 Stat. 4809, 5050 (1994), codified at 47 U.S.C. § 309(j)(13)(D)(GATT Legislation). It also required the Commission to charge a fee for pioneer's preference licenses issued on or after August 1, 1994, based on the winning bids for comparable licenses. 47 U.S.C. § 309(j)(13)(B), (G). While this was similar to the approach taken by the Commission when it earlier assessed payments for narrowband and broadband PCS pioneer's preference licenses, it provided the Commission explicit authority to do so. In implementing this legislation, the Commission interpreted the statute and the continued need to reconcile the pioneer's preference program and the use of auctions as follows:

[W]e believe that competitive bidding affects our pioneer's preference program. The GATT legislation directs us to maintain the program until September 30, 1998 for preference requests accepted for filing after September 1, 1994, and we believe that terminating the program for requests filed on or before that date -- even if desirable -- would accord inconsistent treatment to preference requests simply because of the date on which they were submitted for filing. We do not see a valid reason to distinguish preference requests on that basis. Accordingly, we are retaining the program not only for pioneer's preference requests accepted for filing after September 1, 1994, but also for those accepted for filing on or before that date.

* * *

We find persuasive the argument by several commenting parties that not requiring a pioneer's payment would be inequitable to other licensees and would result in a financial advantage to certain competitors in services in which licenses are assigned by competitive bidding. . . . [P]roviding free licenses to pioneers has the potential to distort the competitive bidding process and provide pioneers with a financial advantage over their competitors. Further, we believe that free licenses would contribute toward an uneconomic

allocation of the spectrum to the extent that recipients of free licenses do not value the spectrum as much as other bidders, especially where licenses are highly interdependent. Finally, we believe that free licenses could result in "unjust enrichment" to pioneers to the extent that their contributions justify only a discounted spectrum payment. As Congress recently recognized in the GATT legislation, payment by pioneers is "necessary to prevent unjust enrichment by ensuring that the value of any such contribution justifies any reduction in the amounts paid for comparable licenses" and to "recover for the public a portion of the value of the public spectrum resource by requiring [each pioneer's preference recipient], as a condition for receipt of its license, to agree to pay [for its license]."

Review of the Pioneer's Preference Rules, Second Report and Order and Further Notice of Proposed Rule Making, ET Docket No. 93-266, 10 FCC Rcd 4523 (1995) (footnote omitted).

2. *Is it appropriate to grant a "Pioneer Preference" for DARS?*

Without addressing or prejudging the merits of the specific DARS pioneer's preference requests, which are still pending adjudicative matters before the Commission, a pioneer's preference award could be granted if any of the requests meet the stringent standards set forth in the Commission's rules and orders. These standards are described in response to question 3, below.

Section 7 of the Communications Act states that it is the policy of the United States to encourage the development of new technologies. The pioneer's preference rules were adopted in furtherance of this policy. Satellite DARS would appear to qualify for the pioneer's preference program, so long as one or more applicants have adequately demonstrated that it was responsible for the innovations that led to development of the service and that its proposal is technologically feasible and the rules ultimately adopted are an outgrowth of the pioneer's preference proposal. In addition, award of a pioneer's preference would recover a portion of the value of the public spectrum because, pursuant to Section 309(j)(13) of the Communications Act, a pioneer's preference grantee must pay a sum calculated by incorporating the price paid for comparable spectrum licensed via competitive bidding.

The Honorable John D. Dingell
May 22, 1996
Page 4

3. *What process has the Commission employed in considering applications for a pioneer's preference award.*

The responsibility for evaluating pioneer's preference applications rests with my office -- the Office of Engineering and Technology (OET). OET established a panel consisting of six individuals from three different Commission Bureaus and Offices to review each satellite DARS pioneer's preference application. The panel was chaired by an OET economist who helped write the pioneer's preference rules. The other members of the panel were all electronics engineers.

The panel evaluated each of the pioneer's preference requests based on the following criteria, in accordance with Section 1.402 of the Commission's Rules: 1) the applicant must have developed an innovative proposal that leads to the establishment of a service not currently provided or a substantial enhancement of an existing service; 2) the applicant must have demonstrated the technical feasibility of its proposal; and, 3) the rules adopted in a proceeding must be a reasonable outgrowth of the applicant's proposal. The findings of the panel were incorporated into a draft agenda item for Commission consideration, which is currently pending.

4. *How does this process compare with whatever process the Commission employed in granting PCS "Pioneer Preference" awards.*

The process employed in evaluating satellite DARS applications was more formal than the process used in evaluating both narrowband and broadband PCS pioneer's preference applications. With respect to PCS, no panels were established. The Commission mostly relied on the record developed by the pleadings and other filings submitted in support of and in opposition to the numerous PCS pioneers preference requests filed. It also relied on the submission of experimental license reports from the applicants and the examination of the record by various Commission personnel.

I trust that this reply is responsive to your concerns. If you have further questions, do not hesitate to contact me.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Richard M. Smith", with a stylized flourish at the end.

Richard M. Smith
Chief, Office of Engineering and Technology